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SUPREME COURT, U. S.

No. 1255

IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

REUBEN L. JONES,

Appellant,

vs.

STATE OF LOUISIANA,

Appellee.

Appeal from the Supreme Court of Louisiana.

APPELLANT'S SUPPLEMENTAL JURISDICTIONAL STATEMENT

JACK & JACK, ATTORNEYS
By Wellborn Jack, Jr.
1625 Slattery Building
Shreveport, Louisiana

Attorneys for Appellant

ATTORNEY OF RECORD:
BILLY R. PESNELL,
Texas Eastern Building
Shreveport, Louisiana.

LECOMTE, SHREVEPORT, LOUISIANA

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The Clerk of the Supreme Court of the United States has requested that we develope in a supplement to our Jurisdictional Statement the time factor involved in this appeal and the reasons supporting our position that this Court has jurisdiction of this appeal. We develope and discuss these matters below.

I. RESTATEMENT OF THE CASE

On December 9, 1966, Appellant was tried and convicted by a Judge of the First Judicial District Court in and for Caddo Parish, Louisiana, sitting without a jury, on two separate Bills of Information charging him with committing the crime of Possession of Burglar Tools and on a third Bill of Information which charged him with committing the crime of Peeping Tom. On January 6, 1967, the District Judge sentenced Appellant to serve a term of one year in prison on each charge of Possession of Burglar Tools and a term of six months in prison on the Peeping Tom charge, with all sentences running concurrently.

Appellant applied for and obtained on January 6, 1967, an order from the District Court allowing him to appeal his convictions on all three charges to the Supreme Court of Louisiana. In an opinion filed December 11, 1967, the Supreme Court of Louisiana affirmed Appellant's conviction on both charges of Possession of Burglar Tools. *State vs. Jones*, 251 La. 431, 204 So. 2d 775 (1967). At the same time, the Supreme Court of Louisiana dismissed, for lack of jurisdiction, Appellant's appeal from his conviction on the charge of Peeping Tom. No application for a rehearing was filed in the Supreme Court of Louisiana.

On January 6, 1968, pursuant to Rule 10 of the Rules of the Supreme Court of the United States, Appellant filed a Notice of Appeal with the Clerk of the Louisiana Supreme Court which, at that time, had possession

of the record. The case was docketed in this Court on March 23, 1968, as No. 1255, October Term, 1967.

The sole questions presented on this appeal are whether, in each of the criminal proceedings brought against him, Appellant was entitled to have his guilt or innocence determined by a fair and impartial jury under the Sixth and Fourteenth Amendments to the Constitution of the United States. The constitutional questions sought to be presented here were timely raised at every opportunity in the Courts below.

The constitutional questions presented here were first raised before trial in the District Court. Appellant filed, in each of the three criminal proceedings pending against him, identical written motions for a trial by jury. In each case, Appellant claimed that he was "entitled under the Sixth and Fourteenth Amendments to the Constitution of the United States to a trial by an impartial jury". The District Court, relying upon the authority of existing State law (Art. VII, Sec. 41, La. Constitution of 1921; La.R.S. of 1950, 15:340, 341), denied Appellant's motions. Appellant timely excepted to the District Court's ruling and in due course perfected Bills of Exception.

The constitutional claims asserted by Appellant in the District Court were renewed in the Supreme Court of Louisiana on Appellant's appeal from his convictions. The Supreme Court of Louisiana rejected Appellant's constitutional claims and, on the authority of existing State law, held that Appellant was not entitled to a trial by jury. *State v. Jones*, 251 La. 431, 204 So. 2d 775 (1967).

This Court has jurisdiction of the appeal by virtue of the provisions contained in 28 U.S.C. §1257 (2), since the Louisiana Courts have sustained the validity of State constitutional and statutory provisions denying Appellant the right to a jury trial on the crimes with which he was charged against Appellant's claim that he was entitled to a jury trial under the Sixth and Fourteenth Amendments to the Constitution of the United States.

II. THE APPEAL WAS TIMELY TAKEN

The written opinion and judgment of the Supreme Court of Louisiana in this case, which was dated and filed December 11, 1967, did not become final as a matter of State law until December 27, 1967. Under the applicable Louisiana law, a judgment of the Louisiana Supreme Court does not become final until the delay within which an application for a rehearing may be filed has expired, Art. 922, *La. Code of Criminal Procedure.* An application for rehearing must be filed, if at all, within fourteen days of the rendition of the judgment. Art. 922, *La. Code of Criminal Procedure.* Where the last day of the time allowed is a legal holiday, the time runs until the end of the next day which is not a legal holiday. Art. 13, *La. Code of Criminal Procedure.* In this case, therefore, the judgment of the Louisiana Supreme Court would ordinarily have become final on December 25, 1967. However, since December 25, 1967, was a legal holiday (La. R.S. of 1950, 1:55) the delay within which an application for a rehearing could be filed did not expire until December 26, 1967. Plainly, therefore, the judgment of the

Louisiana Supreme Court did not become "final" as a matter of State law until December 27, 1967.

It is equally clear that the appeal to this Court was timely taken, whether December 11, 1967, or December 27, 1967, is taken as the date on which the judgment of the Louisiana Supreme Court became "final" for Federal purposes. The applicable rule adopted by this Court provides that:

> "An appeal to review the judgment of a State court of last resort shall be deemed in time when the notice of appeal prescribed by Rule 10 is filed with the Clerk of Court possessed of the record within ninety days after the entry of such judgment." Rule 11, Rules of the Supreme Court of the United States. Cf. 28 U.S.C. §2101 (d).

In this case, Appellant filed his Notice of Appeal to this Court on January 6, 1968, with the Clerk of the Supreme Court of Louisiana, which at that time had possession of the record. Hence, it is indisputably clear that the appeal here was timely taken. Since the appeal was timely taken, this Court has jurisdiction of the appeal, whether the case was timely docketed in this Court or not. *United Public Workers v. Mitchell*, 330 U.S. 74, 84-86.

What has been said, of course, is clearly applicable here insofar as this appeal questions the validity of Appellant's convictions on the two separate charges of Possession of Burglar Tools which the Supreme Court of Louisiana expressly affirmed. However, the Supreme Court of Louisiana dismissed, for lack of jurisdiction,

Appellant's appeal in that Court insofar as it sought review of his conviction on the Peeping Tom charge. No Federal questions have been raised here as to the propriety of the disposition thus made by the Louisiana Supreme Court. Where an appeal is dismissed because not permitted by State law, the judgment of the lower court remains the reviewable judgment. See *Western Union Telegraph Co. v. Hughes*, 203 U.S. 505; *Collan v. Bransford*, 139 U.S 197. The question then is whether the judgment of the District Court denying Appellant the right to a jury trial on the Peeping Tom charge is reviewable by this Court on the present appeal.

Although the notice of appeal filed by Trial Counsel for Appellant did not expressly or specifically designate the judgment of the District Court as a judgment being appealed from, the Jurisdictional Statement unmistakably showed that Appellant was seeking review of the judgment which denied him the right to a jury trial on the Peeping Tom charge. That, obviously, was the judgment of the District Court — not the judgment of the Supreme Court of Louisiana which dismissed Appellant's appeal for lack of jurisdiction. Taking the appeal papers as a whole, the only reasonable implication is that the Appellant intended to appeal from the judgment of the District Court. This Court has consistently refused to permit technical defects to defeat substantial justice. See *Hoiness v. United States* 335 U.S. 297; *United States v. Elliott*, 223 U.S. 524; *State Farm Mutual Automobile Ins. Co. v. Palmer*, 350 U.S. 944. This Court should adhere to that policy here.

If Appellant's appeal papers are broad enough to support an appeal from the judgment of the District Court convicting him on the Peeing Tom charge, as we think they are, the question remains whether the appeal, with respect to that judgment, was timely taken. The resolution of this question, in turn, depends on whether Appellant's appeal from his conviction on the Peeping Tom charge prevented the judgment of the District Court from becoming final for Federal purposes until the Supreme Court of Louisiana rendered judgment dismissing the appeal for lack of jurisdiction. We submit that it did.

It is settled law that where the highest State Court has jurisdiction to review a judgment of a lower State Court, but refused to do so, the time within which certiorari may be applied for begins to run from the date of the order refusing review. *American Express Co. v. Levee*, 263 U.S. 19, 20-21. Similarly, where the trial court's judgment is final insofar as the Federal issues are concerned but appealable on non-Federal issues, this Court has held that it can directly review the Federal portion of that judgment following disposition of the non-Federal issues by the State Appellate Court. *Kentucky v. Powers*, 201 U.S. 1, 37-39. These decisions, if not controlling, are clearly persuasive authority for the proposition that the judgment of the District Court convicting Appellant on the Peeping Tom charge did not become final for Federal purposes until the Supreme Court of Louisiana dismissed the appeal from that judgment for lack of jurisdiction.

It might be argued, of course, that an appeal taken to a Court which has no jurisdiction is, technically speaking, no appeal at all. But this Court has held time and again that the requirement of finality must be given a "practical rather than a technical construction". *Gillespie v. United States Steel Corporation*, 379 U.S. 148, 152; *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541, 546; *Mercantile National Bank v. Langdeau*, 371 U.S. 555; *Hudson Distributors, Inc. v. Eli Lilly & Co.*, 377 U.S. 386. Moreover, considerations of federalism *(Republic Natural Gas Co. v. Oklahoma*, 334 U.S. 62, 69; *Radio Station WOW, Inc. v. Johnson*, 326 U.S. 120, 123-124) clearly support the view that the judgment of the District Court should not be regarded as final until the State Supreme Court has determined the question of jurisdiction.

The Supreme Court of Louisiana plainly had jurisdiction to determine its own jurisdiction. In this case, Appellant had substantial grounds for contending that the Supreme Court of Louisiana had jurisdiction to review his conviction on the Peeping Tom charge by appeal. Trial Counsel for Appellant thought that the Supreme Court of Louisiana had jurisdiction of the Peeping Tom conviction by virtue of the last paragraph of Sec. 10, Art. VII of the Louisiana Constitution of 1921, which provides that if a case is appealed properly to the Supreme Court on any issue "***the Supreme Court has appellate jurisdiction over all other issues involved in the case". In disposing of this contention, the Supreme Court of Louisiana held (204 So. 2d at 776):

> "This contention is without substance for the reason that the appeal from Appellant's conviction under R.S. 14:284 is separate and distinct from his appeals for the convictions in the other two cases. There are three cases and three appeals which have been improperly filed as one appeal. The constitutional provision relied on by counsel applies to a single case presenting several issues. In such instances, if this court has jurisdiction on only one issue, it has the right to take cognizance of and decide all other issues, even though those issues would not be directly appealable here . . ."

The statement that "There are three cases and three appeals which have been improperly filed as one appeal" is surprising since the Supreme Court of Louisiana itself had expressly sanctioned just such a procedure in *State v. Boylston*, 138 La. 21, 69 So. 860 (1915). Moreover, in considering a similar jurisdictional question in *State v. Peters*, 142 La. 250, 76 So. 703 (1917), the Supreme Court of Louisiana had held (76 So. at 703):

> ". . . The other case is *in no way involved* in the present one; hence the sentence in it cannot serve as a basis for jurisdiction in the present one. [emphasis added]
>
> "Appeal dismissed."

Here, the Peeping Tom charge was *directly and inextricably involved* with the charge of Possession of Burglar Tools as the facts clearly show. On July 8, 1966, Appellant was charged in a Bill of Information filed by the District Attorney in the First Judicial District Court with the crime of Possession of Burglar Tools (No. 68,678). By a separate Bill of Information (No. 68,676) filed on

the same day, Appellant was charged with the crime of Peeping Tom which was alleged to have been committed at the same time and place that the offense of Possession of Burglar Tools was committed. Section 14 of Title 95, La.R.S. of 1950, defines the crime of Possession of Burglar Tools as "[t]he ownership, possession, custody or use of any tools, . . . or other instrumentality customarily used by thieves or burglars at any time by any person with the intent to commit a crime; . . .". It was the theory of the State that on the single occasion described in these two Bills of Information, Appellant committed the crime of Possession of Burglar Tools because he had, or so the State alleged, possession of tools customarily used by burglars (a flashlight, a long screwdriver, and a pair of socks), with the intention of committing the crime of Peeping Tom. These two Bills of Information, therefore, charged Appellant with committing two crimes that were directly related: The Peeping Tom charge was an essential element of the State's case on the charge of Possession of Burglar Tools. For these reasons, the District Court ordered the two cases consolidated for trial and later for appeal. See, in this connection, Art. 706, *La. Code of Criminal Procedure* which provides that:

> "Upon motion of a defendant or of all defendants, if there are more than one, the court may order two or more indictments consolidated for trial if the offenses and the defendants, if there are more than one, could have been joined in a single indictment. The procedure thereafter shall be the same as if the prosecution were under a single indictment."

See also Art. 934 (6), *La. Code of Criminal Procedure*, defining the term "indictment" to include information and affidavit.

From what has been said, it is plain that the Peeping Tom charge was directly and inextricably involved in the first Possession of Burglar Tools charge filed. Since the Supreme Court of Louisiana had jurisdiction of Appellant's appeal from his conviction on the charge of Possession of Burglar Tools, it could reasonably be argued in the circumstances of this case that it also had jurisdiction of his conviction on the Peeping Tom charge.

III. THIS COURT HAS JURISDICTION OF THE APPEAL EVEN IF THE CASE WAS NOT TIMELY DOCKETED AND THE APPEAL SHOULD NOT BE DISMISSED.

The appeal in this case was docketed in this Court on March 23, 1968. If the judgment of the Louisiana Supreme Court became final on December 27, 1968, for Federal purposes, then the appeal was timely docketed in this Court. On this view, March 26, 1968, would have been the last day for docketing the appeal. On the other hand, if the judgment of the Louisiana Supreme Court became final on December 11, 1967, for Federal purposes, then the appeal was not timely docketed in this Court. In that case, the 90 day delay for docketing the appeal would have expired March 11, 1968, since the 90th day was Sunday, March 10, 1968. Hence, on that view, the appeal was docketed 12 days late. On the authority of

Market Street Railroad Co. v. Railroad Commission, 324 U.S. 548, 551-2, it seems likely that the appeal was not timely docketed.

Since the appeal was timely taken, however, this Court has jurisdiction of the appeal regardless of whether the case was timely docketed. *United Public Workers v. Mitchell*, 330 U.S. 75, 84-86. As this Court said in *Pittsburgh Towing Co. v. Mississippi Valley Barge Line Co.*, 385 U.S. 32, it has been "generous in excusing errors of counsel" and is "generous in exercising our discretion to forgive a mistake and waive the consequences of negligence." We submit that in the circumstances of this case the Court should exercise its discretion and excuse any error in timely docketing the appeal.

We believe that the Court's indulgence is justified on the following grounds:

(1) Trial Counsel for Appellant, who prepared and filed the Notice of Appeal and the Jurisdictional Statement and docketed the appeal in this Court, thought that the 90 day period allowed for filing the Notice of Appeal and docketing the case in this Court began to run when the judgment of the Louisiana Supreme Court became final under State law. It never occurred to him that Federal standards of finality might differ from the applicable State standards. Trial Counsel for Appellant is not a member of the Bar of this Court and he had no prior

experience in this Court. This case is the first occasion that he has found it necessary to resort to this Court.

(2) Trial Counsel for Appellant knew that the case of *Duncan v. Louisiana*, No. 410, was pending in this Court and had been orally argued on January 17, 1968. Since that case involves similar issues, Trial Counsel delayed the preparation of the Jurisdictional Statement, with the hope that a decision in *Duncan* would be handed down before the delay for docketing the appeal expired.

(3) The State, in this case, was not injured or prejudiced in any way by any failure to timely docket the appeal.

(4) Unlike *Pittsburgh Towing Co.*, this is a criminal case. Appellant stands convicted of three serious crimes. If the convictions were legally obtained, then the State could justifiably insist that Appellant pay his debt to society. If, however, the convictions were illegally obtained because Appellant was deprived of his constitutional right to a jury trial, as we submit, it would be unconscionable to require him to serve the sentences imposed because of his attorney's error, if error there was, in timely docketing the case.

For these reasons, we submit that any error in timely docketing the case should be excused.

Respectfully submitted,

JACK & JACK

By: .....

Wellborn Jack, Jr.
1625 Slattery Building
Shreveport, Louisiana 71101

Attorneys for Appellant

ATTORNEY OF RECORD:

.....

Billy R. Pesnell
Texas Eastern Building
Shreveport, Louisiana 71101

May, 1968.

APPENDIX

Article 13, Louisiana Code of Criminal Procedure:

> In computing a period of time allowed or prescribed by law or by order of court, the date of the act, event, or default after which the period begins to run is not to be included. The last day of the period is to be included, unless it is a legal holiday, in which event the period runs until the end of the next day which is not a legal holiday.
>
> * * * *

Article 922, Louisiana Code of Criminal Procedure:

> A. Within fourteen days of rendition of the judgment of the supreme court, in term time or out, a party may apply to the supreme court for a rehearing. The court may act upon the application at any time.
>
> B. A judgment rendered by the supreme court becomes final when the delay for applying for a rehearing has expired and no application therefor has been made.
>
> * * * *

Article 706, Louisiana Code of Criminal Procedure:

> Upon motion of a defendant, or of all defendants if there are more than one, the court may order two or more idictments consolidated for trial if the offense and the defendants, if there are more than one, could have been joined in a single indictment. The procedure thereafter shall be the same as if the prosecution were under a single indictment.
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